ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-128

To: The Commission

COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

CompTel does not dispute that payphone services providers ("PSPs") should receive fair compensation for access code and subscriber 800 calls. At the same time, however, any compensation scheme also must be fair to the carriers paying for it and the end users who ultimately bear the costs. Fairness to all requires (1) a properly justified compensation amount (2) allocated among a properly defined class of payors (3) on the basis of a formula properly related to the number of access code and subscriber 800 calls received by each carrier, (4) adopted pursuant to procedures in compliance with the Administrative Procedure Act. The U.S. Court of Appeals in *Illinois Public Telecommunications* found all four of these critical aspects lacking in the Commission's *Payphone Compensation* decision. As a result, the Court found the scheme arbitrary and capricious, granted petitions for review seeking vacatur of the payphone compensation plan and remanded the matter to the Commission for additional consideration.

In a *Public Notice* initiating this remand proceeding, the Commission has grossly misunderstood the Court's decision, essentially treating it as a mere finding of a failure to provide adequate justification for the conclusions reached. In fact, the Court strongly suggested that the Commission substantially overestimated the costs of access code and subscriber 800 calls by erroneously equating them with local coin calls; erroneously limited the group of carriers required to pay on the per-phone interim compensation plan merely for the sake of administrative convenience; and significantly misallocated the compensation amounts among that group by using a formula irrelevant to each carrier's proportion of access code and subscriber 800 calls. These revisions will greatly reduce the amount of

compensation to be paid and drastically alter the allocation of payments for any per-phone scheme. In the face of these fundamental deficiencies, the Commission cannot -- as its *Public Notice* essentially does -- assume that the Court left it empowered to enforce its arbitrary and capricious policies indefinitely until a new plan is adopted. Rather, in the face of the *Illinois Public Telecommunications* reversal, the Commission's payphone compensation scheme has been voided. In its place, as in other situations where revised rules are reversed by the courts, the prior $6-per-phone per-month compensation plan has been reinstated.

Moreover, in adopting a revised policy on remand, the FCC must bear in mind that it may not impose a new scheme retroactively. To do so would, in the words of Justice Scalia, "make a mockery" of the Administrative Procedure Act. Thus, any revised interim plan may be applied only on a prospective basis.

The new compensation plan should focus on recovery of the PSPs' forward-looking direct costs associated with the origination of coinless calls. This plan would exclude termination costs and costs associated with coin equipment purchases, coin collection and repair and maintenance of coin-related functions.

The revised plan also should include ILECs among the group of payors in any per-phone interim arrangement. Those companies have substantial access code and 800 subscriber traffic and cannot fairly be exempted from a per-phone payment obligation. Further, the plan must allocate payment responsibilities on a basis related to the proportion of access code and subscriber 800 calls actually carried, not simply on the basis of toll revenues.

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To: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following comments in response to the Common Carrier Bureau's *Public Notice* issued August 5, 1997 in this docket.[1]

I. INTRODUCTION

At the outset, CompTel wishes to make clear that it does not dispute that payphone service providers ("PSPs") should receive compensation for access code and subscriber 800 calls. Nor does CompTel seek to deny PSPs a fair opportunity to obtain a reasonable return for the services they provide. Therefore, CompTel does not object to a requirement that all carriers handling access code or subscriber 800 calls pay reasonable compensation to the PSP originating the call.

The key concern for CompTel is ensuring that the Commission adopts valid rules setting a compensation amount that is fair to all parties -- the PSPs receiving it, the carriers

[1] *Public Notice*, Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding, DA 97-1673 (rel. Aug. 5, 1997).

paying it, and the consumers that ultimately must bear the cost of it. Compensation pursuant to Section 276 should not exacerbate the "high rate" problem for payphone-originated calls. Nor should it lead to blocking of payphone calls and a reduction in the service available from public payphones. Further, compensation mechanisms should not unfairly impose payment obligations on carriers without advance notice and an opportunity to recover the additional costs that will be incurred.

In these comments, CompTel addresses several issues emanating from the obligation that compensation be "fair." First, compensation pursuant to Section 276 is not self-executing. The Act does not mandate compensation at any date certain; it instead requires the Commission to adopt rules to ensure fair compensation for payphone calls. It follows from this requirement that carriers are not obligated to pay compensation in the absence of valid FCC rules prescribing it. Because the Court's remand also vacated the FCC's rules, carriers are not obligated to pay compensation until *after* the Commission adopts new rules on remand, and the Commission lacks authority to prescribe compensation on a retroactive basis.

Second, fair compensation requires that compensation be based upon the costs incurred by the compensable calls. The *Illinois* Court underscored this requirement when it concluded that the Commission acted arbitrarily and capriciously by using a surrogate (the local coin rate) that did not reflect the costs of coinless calls. Therefore, CompTel recommends that the Commission establish a new default compensation rate, based solely on the costs that are incurred in originating access code and subscriber 800 calls.

Third, although the interim compensation plan has been vacated, and there is no clear need for a new interim plan once per-call tracking becomes available, fairness dictates that if compensation is to be paid in the future on a per-phone basis, the Commission must apportion that compensation fairly among all carriers. This means that the Commission must include all carriers receiving compensable calls -- including local exchange carriers ("LECs") -- if it is to require *any* carrier to pay compensation. Moreover, it must allocate the relative share of compensation for any per phone plan in reasonable proportion to the number of compensable calls received by each carrier.

II. THE DEFAULT RATE AND INTERIM COMPENSATION PLAN HAVE BEEN VACATED BY THE COURT OF APPEALS, AND THE COMMISSION MAY NOT IMPOSE COMPENSATION ON A RETROACTIVE BASIS

The *Public Notice* asserts that the *Illinois Public Telecommunications* decision "actually vacated only one narrow aspect of [its Payphone Orders]" and, therefore, except for this one aspect (BOC asset valuation), "all of the requirements of the *Payphone Orders* -- including those portions that were remanded to the Commission -- remain in effect pending further action by the Commission on remand."[2] The *Public Notice* misinterprets the Court of Appeals' decision. As shown below, the effect of the Court's decision is to vacate the FCC's rules, subject to its authority to adopt interim rules during the remand or final rules on remand that remedy the errors identified by the Court. Unless and until the Commission takes one of these actions, carriers receiving compensable calls are not under any obligation to pay compensation to PSPs for access code or subscriber 800 calls.[3] Moreover, the

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[2] *Public Notice* at 1-2.

[3] In order to remove any potential doubt, CompTel joined with eight other carriers in a motion seeking clarification that the rules have been vacated pending Commission action on remand. Motion for Clarification or, Alternatively, for Partial Rehearing, D.C. Cir. No. 96-1394 (Aug. 15, 1997). The FCC has opposed this Motion (Response of Federal
(continued...)

Commission lacks the authority to impose compensation obligations on carriers retroactively. Thus, it cannot increase a carrier's compensation obligation "should the equities so dictate," as the *Public Notice* asserts. If and when the Commission prescribes a new compensation plan, that plan will have prospective application only.

A. The Court's Decision Vacates the FCC's Compensation Rules

The *Public Notice* rests its interpretation on the asserted significance of the fact that the opinion lacks an explicit statement that the $0.35 default rate and interim compensation plan were "vacated." Elevating form over substance, the *Public Notice* seeks to evade the force and logic of the Court's opinion, both of which confirm that the default rate and the interim plan have been vacated.

The Court's basis for concluding the FCC acted arbitrarily and capriciously goes directly to the heart of the compensation plans. The Court ruled that "the FCC's conclusion that compensation for 800 and access code calls should be set at the deregulated local coin rate is unjustified." *Op.* at 16. This was so, the Court held, because the Commission "cavalierly proclaims" that the costs are "similar" without even acknowledging, much less responding to, "solid data" showing that "the costs of local coin calls versus 800 and access code calls are *not* similar." *Op.* at 14-15. Thus, the Court unambiguously held that the FCC's *ipse dixit* conclusion "epitomizes arbitrary and capricious decisionmaking" and that

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[3](...continued)
Communications Commission to Motion for Clarification or, Alternatively, for Partial Rehearing, D.C. Cir. No. 96-1394 (Aug. 22, 1997)), as have the RBOC intervenors (RBOC Intervenors' Conditional Response to Motion for Clarification, D.C. Cir. No. 96-1394 (Aug. 22, 1997)), Peoples Telephone and the American Public Communications Council (response of the American Public Communications Council and Peoples Telephone Company, Inc., to the Motion for Clarification of Certain Interexchange Carrier Parties, D.C. Cir. No. 96-1394 (Aug. 22, 1997)).

"the $.35 rate . . . cannot stand." *Op.* at 15-17. Further, the Court found the "interim *plan*" arbitrary and capricious because the FCC "cites no reasonable justification" for the imputed compensation amount and it arbitrarily imposed the obligation to compensate PSPs on only a few IXCs. *Id.* at 17. This is not a case where the Court found the FCC's actions inadequately explained or only "potentially arbitrary," as the *Public Notice* asserts (at 2). To the contrary, the Court examined the substance of the FCC's decision, and found it arbitrary and capricious. The logical conclusion from this is that the FCC's arbitrary rule has been set aside, pending further action on remand.

Another indication that the Court intended to vacate the default rate and interim plan is found in the ordering language used throughout the opinion. Although it is true that the Court did not expressly vacate the default rate or interim plan, the *Public Notice* overlooks the fact that neither did the panel simply remand for further consideration without granting the petition for review. The fact that the Court *granted* petitions for review requesting that the Court vacate the compensation plans (not simply a remand) supports the conclusion that it vacated the default rate and interim compensation plan. Moreover, the Court twice used a single phrase -- "we grant in part and deny in part the petitions for review" -- to characterize its holding on <u>all</u> of the issues that it remanded to the Commission. *Op.* at 4, 28. Despite this common result, the Court used slightly different language within each of the five sections discussing the issues in detail: Twice, it merely "remanded" the issue;[4] once, it "grant[ed] the petition for review . . . and remand[ed] the matter;"[5] once, it

[4] *Op.* at 16 (discussing compensation amount); *id.* at 19 (addressing compensation for inmate calls).

[5] *Id.* at 17 (discussing interim compensation).

instructed the Commission "on remand, [to] correct this flaw . . .;"[6] and once, it "vacate[d] and remand[ed]" the rule, *without* explicitly granting the petition for review.[7] Nothing in the Court's decision or circuit precedent suggests that these slight variations in ordering language are accorded decisive significance in determining the effect of the decision.[8] To the contrary, the common disposition of granting the petitions for review suggests that the Court meant the same thing on each issue: that the arbitrary and capricious decision was vacated and remanded to the agency for further proceedings. Therefore, the proper interpretation of the decision is that it vacates the Commission's rules pending further action on remand.

In an attempt to mitigate the impact of the Court's decision, the *Public Notice* cites case law from the Court in support of the concept of remanding for further explanation without vacating. *See Public Notice* at 2 n.3. However, this discussion misses the point. The question for the Commission is not what the Court could have done, but what it actually did. As shown above, regardless of whether or not the Court *can* remand without vacating the order (an issue that has been debated in the D.C. Circuit but never definitively resolved),[9] the effect of the decision is to vacate the FCC's rules. Indeed, the case law cuts against rather than for the *Public Notice's* conclusion, for in those instances where the Court has

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[6] *Id.* at 19 (addressing compensation for 0+ calls).

[7] *Id.* at 28 (addressing asset valuation).

[8] Indeed, given that the decision was filed *per curiam*, it is possible that these differences are the result of multiple authors, each with a slightly different style, writing different sections of the decision.

[9] *Checkosky v. SEC*, 23 F.3d 452, 490-93 (D.C. Cir. 1994) (opinion of Randolph, J.); *see American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 n.1 (D.C. Cir. 1994); *American Medical Ass'n v. Reno*, 57 F.3d at 1135 n.4.

remanded without vacating it has explicitly declined to vacate the agency action. *See, Allied Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993). The absence of similar language in the Court's opinion bolsters the conclusion that the arbitrary and capricious default rate and interim plan were indeed vacated.

For similar reasons, there is no merit to the *Public Notice's* assertion that the interim plan was not vacated because it "follows logically" from the Court's decision that a decision to "discontinue" interim compensation would be found to be contrary to Section 276.[10] Not only does this logic assume that which it purports to prove (that the Court has not vacated the rules, and therefore the FCC may decide whether to "discontinue" it), but the *Public Notice* misconstrues Section 276 to require compensation even if the FCC has not promulgated valid rules. But that is not what Section 276 says. Section 276 imposes an obligation on the FCC to promulgate compensation rules, but leaves the Commission discretion to determine under what circumstances compensation is appropriate, when to begin a compensation plan, and how to administer it.[11] The Commission itself implicitly rejected the proposition that Section 276 independently required compensation when it declined in its initial orders to make per-call compensation retroactive to the date of the Notice of Proposed Rulemaking (or the date of the Act, for that matter).[12]

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[10] *Public Notice* at 2 n.3.

[11] *See* 47 U.S.C. § 276 (The Commission *shall prescribe* rules to ensure fair compensation for each and every call originating from payphones). For example, Section 276 does not endow PSPs with a substantive right to compensation independent of any FCC rules implementing it.

[12] *Report & Order*, ¶ 126.

Under such a scheme, the Court's criticisms of the FCC's failure to include 0+ calls merely amount to a holding that if interim compensation is prescribed, the Commission may not exclude certain calls (0+ calls for which BOCs are otherwise precluded from negotiating compensation) from the compensation mechanism. Neither the Court nor Section 276 mandated that there be an interim period at all.

B. The Commission Lacks Authority to Prescribe Compensation Retroactively

Because the compensation rules have been vacated, no compensation obligation is due at this time. Moreover, the Commission cannot on remand adopt a rule reimposing compensation for the period during which it failed to adopt valid rules. An agency does not have authority to promulgate retroactive rules, unless Congress grants such authority in express terms. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); *Motion Picture Ass'n of America v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992). Because neither Section 276 nor any other provision of the Communications Act authorizes the FCC to promulgate retroactive rules, the FCC is without power to establish a new interim plan that addresses the period back to November 1996, when the FCC's arbitrary and capricious rules initially took effect.

The facts of *Bowen* are on point. In *Bowen*, the Secretary of Health and Human Services ("Secretary") promulgated a rule in 1981 imposing cost-limits on Medicare providers. *Bowen* at 206. The rule was set aside in 1983 by the Court of Appeals for the D.C. Circuit, on the ground that the Secretary failed to provide notice as required under the APA. *Id.* The Secretary responded to this ruling by promulgating a new rule in 1984 (with proper notice) purporting to reissue the old cost-limit rule, retroactive to the original 1981 effective date. *Id.* at 207. As the Supreme Court explained, the "net result was as if the original rule had never been set aside." *Id.* The Court held the new rule invalid, because no provision of the Medicare Act authorized the Secretary to promulgate retroactive rules. *Id.* at 208.[13] Even where, as in *Bowen*, the agency's intent is to "correct" a previous error, it does not have authority to promulgate retroactive rules. *See id.* at 225 (Scalia, J, concurring) ("curative" retroactivity "'would make a mockery . . . of the APA' . . . since 'agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to 'reissue' that rule on a retroactive basis'").

There can be no doubt that imposition of an interim compensation obligation upon small CompTel members would be retroactive rulemaking. The Commission's initial orders excluded small IXCs from the obligation to pay interim compensation. Small IXCs relying upon the Commission's determination that no compensation was owed, focused on preparing for per-call compensation, which is scheduled to begin in October 1997. The Commission cannot now (in August 1997) tell these carriers that they owe compensation for November 1996 without violating the prohibition on retroactive rulemaking.

This is not to say that PSPs must receive no compensation or that the Commission is powerless to establish another interim compensation plan pending its action on remand. The Commission's precedent establishes that the effect of invalidating a new rule replacing a prior rule is automatically to spring the old rule back into effect. *See Computer III Remand Proceedings*, 5 FCC Rcd 7719, 7719 and n.18 (1990). Therefore, when the Court vacated

[13] The Court emphasized that the power to adopt retroactive rules must be conveyed "in express terms." *Id.* "Even where some substantial justification for retroactive rulemaking is presented," the Court held, "courts should be reluctant to find such authority absent an express statutory grant." *Id.*

the new interim plan, the prior per-phone compensation plan sprang back into effect, and governs the parties' compensation obligations pending further action on remand. Further, the Commission has authority to address any immediate need by the PSPs through adoption of an "interim" interim plan, which would be in effect until the Commission completed its remand proceedings. *See Mid-Tex Electric Coop. v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987). The thing the Commission cannot do is promulgate a new rule as if the original rule had never been invalidated.

III. THE COMMISSION SHOULD SET A NEW DEFAULT COMPENSATION AMOUNT, AND CALCULATE IT BASED ON A REASONABLY EFFICIENT PSP's COST OF ORIGINATING ACCESS CODE AND SUBSCRIBER 800 CALLS

In remanding the default compensation level, the Court of Appeals unambiguously rejected the proposition that the costs of all payphone calls are similar. *Op.* at 14. It found that several parties had submitted "solid data" showing that the costs of local coin calls were higher than the costs of originating coinless calls (e.g., access code and subscriber 800 calls), a point that even APCC conceded. *Id.* In order to respond to the Court's remand, the Commission must now face this data squarely, and choose a default compensation amount that reflects only the cost of access code and subscriber 800 calls, not the costs of other calls originated from payphones. There is no ready-made surrogate that can be used to determine the cost of compensable payphone calls. Rather, the Commission must examine the costs of originating these calls, and should set compensation equal to the additional, or marginal, costs created by access code and subscriber 800 calls. CompTel recognizes that the Commission indicated in the past that every call should make some contribution toward the fixed cost of providing a payphone. Although it is not necessary for access code and subscriber 800 calls to bear a portion of these costs in order to ensure that PSPs are fairly compensated (because existing revenue streams more than adequately compensate PSPs), if the Commission wants to provide such a contribution, it should set compensation based on the forward-looking direct costs incurred to originate these calls.

Significantly, neither CompTel nor the Court challenge the FCC's conclusion in its *Payphone Orders* that "fair" compensation means compensation that is tied to a PSP's costs in originating the compensable calls. *See, e.g., Report and Order*, ¶¶ 67, 70 (concluding that "PSPs should be compensated for their costs in originating . . . calls using their payphones" and that "deregulated local coin rates are the best available surrogates for payphone costs"). The Commission erred not in choosing cost-based compensation, but in adopting a "market-based" surrogate that did not reflect the costs of these calls.[14] Indeed, cost-based compensation is the only compensation rate that is "fair" to all entities (including consumers). Thus, the question for the Commission on remand is simple: what costs are created by *access code and subscriber 800 calls*, as opposed to other calls from payphones?

In its initial comments in July 1996, CompTel recommended that the Commission prescribe compensation based on the marginal costs of originating these calls, and it continues to believe that this approach best fulfills Section 276's mandate that the Commission ensure PSPs are "fairly compensated" for each and every call from their payphones. "Fair"

[14] The *Payphone Orders* did not eschew cost-based compensation in favor of "market-based" compensation, as the *Public Notice* suggests. *Public Notice* at 2 (asking how cost differences affect a "market-based compensation amount"). Rather, the Commission adopted costs as the appropriate standard, but used a "market" rate (the local coin rate) as a surrogate for determining those costs. The Court's opinion, which found that the surrogate did not reflect cost differences in the types of calls, supports the interpretation that Section 276 requires cost-based compensation.

compensation pursuant to Section 276 requires the Commission to ensure that, as a whole, PSPs can recover their costs and that, on an individual call basis, no call avoids contributing to the costs it creates. It does not require, however, that each and every call contribute equally toward a PSP's overall return. Indeed, the lesson from the Court's remand is that compensation for a particular call must bear a relationship to *its* costs, not the costs of some other calls placed from the payphone.

The marginal cost standard for access code and subscriber 800 calls is fair to PSPs, consumers, and carriers because these calls are a by-product of a payphone installation, not its primary purpose. Data recently published by APCC indicates that an average independent payphone originates over 713 calls per month, the overwhelming majority (72 percent) of which are local and 1+ coin calls.[15] These calls drive the economic decision whether and where to install a payphone, and the Commission has granted PSPs complete flexibility in determining the price they will charge for these calls.[16] Access code and subscriber 800 calls, while no longer a *de minimis* consideration, do not determine whether a PSP will install a particular payphone.

As a result, the existence of a payphone can be regarded as a given for purposes of determining compensation. To the extent that a PSP needs a minimum level of income to place a payphone, that income is guaranteed by the deregulated rate PSPs will soon be able to charge for the nearly three-quarters of their traffic that are coin calls. On the other hand,

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[15] "The Numbers are in . . .", *Perspectives*, Aug. 1997 at 35 (attached as Exhibit A). The applicability of this number to LEC-owned payphones has not been established.

[16] At a local coin rate of $0.35 per call, the PSP will derive at least $178.85 per month from the volume of local and 1+ coin calls that APCC reports. *See id.* (511 of 713 calls are coin calls). Indeed, since some of the 511 calls are 1+ (sent-paid) coin calls, which average significantly more than $0.35 per call, a PSP's revenue from coin calls will be even higher.

PSPs are compelled by statute to permit access code calling (but not to permit 800 calling), and some compensation for this public policy choice is appropriate. But the PSP's cost of permitting such access is only the additional or incremental costs that are created when a caller uses an access code to place a call. The relevant cost factors for this would be the additional maintenance and wear and tear occasioned by the increased usage and the per-minute usage charges (if any) imposed by a LEC for originating access code or subscriber 800 calls.

In the alternative, if the Commission wishes also to include a portion of the equipment costs incurred to install a payphone, CompTel recommends that the Commission base compensation on the forward-looking, direct costs incurred by an access code or subscriber 800 call. Direct costs would include not only the marginal costs created by an access code or subscriber 800 call, but also a share of the equipment and payphone line expense attributable to usage of the payphone. In order to arrive at these direct costs, assume for a moment that one would install a payphone solely to originate access code and subscriber 800 calls. The cost of such a payphone would be comprised of three elements: (1) the cost of acquiring and installing a coinless payphone, amortized over an appropriate period, (2) the cost of maintaining that equipment, and (3) the cost of a basic phone line (plus usage, if separate usage charges are incurred for access code and subscriber 800 calls). These are the direct costs created by coinless calls, and these are the costs to which compensable calls should pay their share, in proportion to overall usage of the payphone (which in the hypothetical was 100 percent, but which is merely a fraction of that in an actual environment).

By the same token, the direct cost of access code and subscriber 800 calls should *exclude* those costs that are not created by the origination of coinless calls. Principally, this includes the costs of coin equipment and coin collection, neither of which are needed to originate access code or subscriber 800 calls. A payphone equipped with coin capability is more expensive than a coinless phone. In addition, coin phones require greater maintenance, due to broken or jammed coin mechanisms, and require more frequent site visits in order to collect the monies deposited in the phones. These costs are not necessary to originate access code and subscriber 800 calls, and should not be recovered by these calls.

Direct costs also should exclude costs of *terminating* local calls, such as long distance charges assessed on 1+ calls and usage charges for *local* coin calls. Further, commissions paid to location owners should be excluded, because these commissions are paid on 0+ and 1+ revenues generated by the phone, not on other call types, such as access code or subscriber 800 calls. Finally, administrative or overhead charges are not properly attributable to coinless calls, and should not be included in the compensation amount.[17]

IV. IF THE COMMISSION ADOPTS ANOTHER INTERIM COMPENSATION PLAN, IT MUST INCLUDE ALL CARRIERS RECEIVING COMPENSABLE CALLS AND MUST APPORTION THE OBLIGATION AMONG THEM IN A RATIONAL WAY

As explained above, the Court of Appeals has vacated the FCC's interim compensation plan. With the date for the start of per-call tracking fast approaching, there is little need for another interim, per-phone compensation plan, and the Commission's resources

[17] The *Public Notice* also asks for comment on whether the local coin rate may be used as a starting point, with an offset for expenses unique to those calls. *Public Notice* at 2. CompTel does not recommend this approach. However, if the Commission uses this approach, it must also subtract from the local coin rate an amount equal to a carrier's costs in tracking and billing compensation under the Commission's orders. The Commission places these costs on the carrier receiving the call, even though they are billing costs that ordinarily would be placed on the entity seeking payment (*i.e.*, the PSP). Carriers should not be forced to undertake these actions on the PSPs' behalf without receiving compensation from them for it.

would be best served by focusing solely on creating a reasonable and workable per-call compensation plan. Nevertheless, if any per-phone compensation is ordered, the Commission must rectify the two errors in its prior interim plan that were identified by the Court of Appeals.

First, and most importantly, the Commission must ensure that any per-phone compensation plan includes *all* carriers that receive compensable calls, not just a subset of them. Displaying a disturbing and illogical tunnel vision, the *Public Notice* continues to focus on "IXCs" as payors of compensation, ignoring that other carriers, including in particular LECs, also receive the types of calls that are subject to compensation. It is the act of carrying compensable calls, not the label the Commission places on a carrier, that determines whether a carrier owes compensation for payphone calls.

The Commission initially excluded LECs because of "administrative practicality and because LECs, on an individual basis, currently do not carry a significant volume of compensable calls."[18] Factually and legally, this rationale is unjustifiable. First, as the Court of Appeals clearly held, "administrative convenience cannot possibly justify an interim plan that exempts all but [a few carriers] from paying for the costs of services received." *Op.* at 17. If any carrier receives compensable calls (whether LEC or IXC), the Commission must include them in any plan requiring per-phone compensation. Moreover, LECs can and do receive significant volumes of calls from payphones. All of the BOCs (and most independent LECs) issue calling cards that may be used both on a 0+ and a dial around basis. Further, many also issue prepaid calling cards, which must be used by dialing an access code to reach the calling card platform. LECs also are significant players in the intraLATA toll

[18] *See Public Notice* at 4 n.10 (quoting the *Order on Reconsideration*).

market, including intraLATA 800 services. These numbers also can be dialed from payphones. Indeed, there is nothing in the interLATA or intraLATA nature of an 800 call that makes it any more or less likely to originate from a payphone. As a result, LECs are just as capable of being carriers that receive compensable calls from payphones as are any other class of carriers. If there is to be any per-phone compensation mechanism, these carriers must be included.

The second error in the original interim compensation scheme that cannot be replicated in a new per-phone plan is that it must apportion the share of compensation fairly among all carriers receiving compensable calls. The Commission's standard for allocating such obligation in the past (total toll revenues) bears no nexus to the number of compensable calls that a carrier receives. For example, carriers that predominantly provide 1+ toll or private line services are less likely to receive compensable calls than a debit card provider with equal revenues. This presents the Commission with a true quandary, because there does not appear to be any surrogate that provides a rational apportionment among carriers receiving compensable calls. Yet, if the Commission chooses to adopt another per-phone compensation plan, it must demonstrate a nexus between its standard and each carrier's share of compensable calls.

CONCLUSION

For the foregoing reasons, the Commission should adopt a new default compensation rate reflecting a proportionate share of forward-looking marginal costs allocated among all carriers on the basis of access code calls. Unless and until the Commission prescribes a new prospective rate, carriers are not obligated to compensate PSPs pursuant to the

Commission's vacated rules, which the agency is without authority to promulgate on a retroactive basis.

Respectfully submitted,

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EXHIBIT A

The Numbers are in...

APCC's SMDR Project provides telling statistics on payphone calls

by Gregory V. Haledjian

How many calls are made from an average payphone each month? How many of them are coin? How many are non-coin? How many are dial-around? Which interexchange carriers (IXCs) get the most calls from payphones? Independent public payphone (IPP) providers can answer these questions about their own phones, but industry-wide statistics haven't been available until just recently. Now, providers can compare their own information with industry-wide numbers, and the American Public Communications Council Inc. (APCC) can use the statistics for legal, legislative and regulatory purposes.

In fact, the APCC is where this numbers project all began. When the association was working before the Federal Communications Commission (FCC) to develop regulations for implementing the payphone provisions of the Telecom Act, it needed data to accurately demonstrate call traffic patterns from IPPs. The association developed a sample group that would accurately reflect all the IPPs in the United States (local exchange carrier [LEC] payphones are not included). Currently, 23 companies that operate more than 100,000 phones are participating in what is known as the SMDR Project (station message detail reports). These companies are submitting monthly call data from 4,400 payphones in 32 states. They're tracking and reporting information on completed call counts and duration. The APCC defined a completed call for this project by setting an acceptable duration for each type of non-coin call. The payphones are at a wide variety of locations, including hotels, motels, convenience stores, gas stations, restaurants, business districts, shopping malls, apartment buildings, truck stops and casinos.

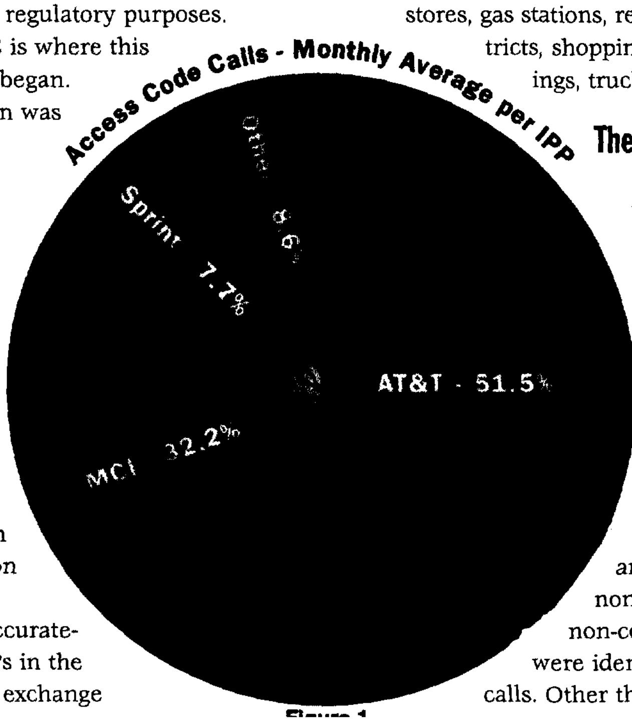
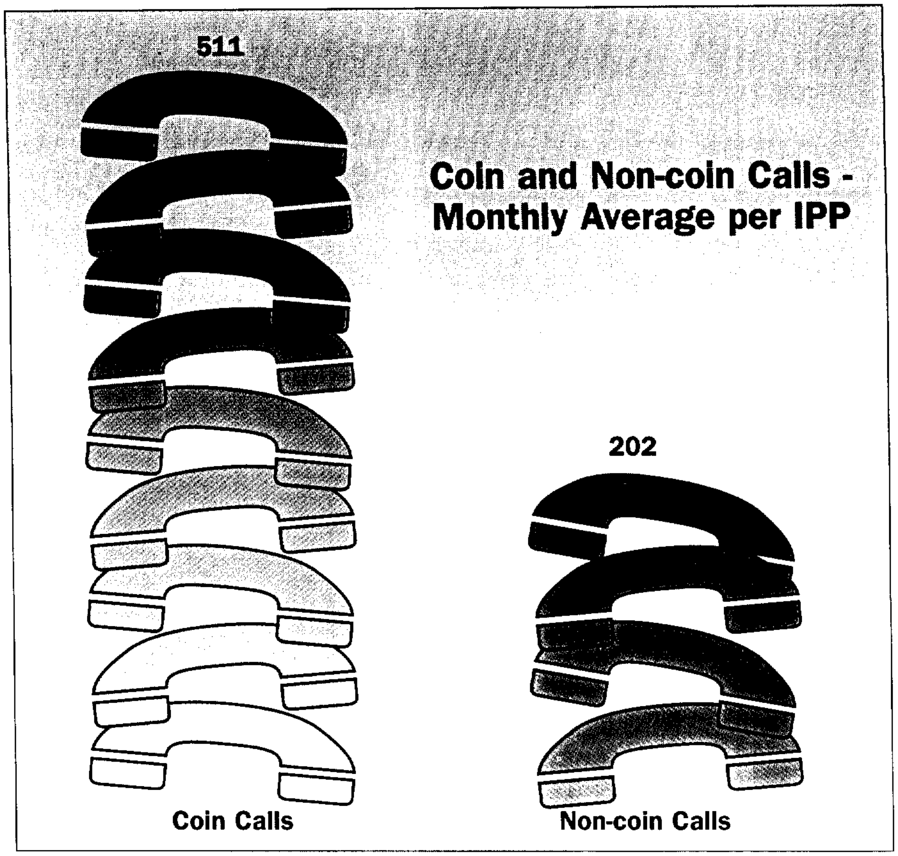


Figure 1

The results

At the time this article was prepared, the APCC had been able to crunch 11 months' worth of data, from February to December 1996. In this time period, the data showed an average of 713 completed calls per payphone per month. Of these, 511 (72 percent) were coin calls, and 202 (28 percent) were non-coin calls. Of the 202 non-coin calls, 39 (19 percent) were identified as access code calls. Other than subscriber 800 calls,



the rest of the non-coin calls broke down as follows: 24 (12 percent) were 0+ calls, 10 (5 percent) were 0- calls, 5 (2 percent) could be positively identified as prepaid card calls, 2 (1 percent) were 00- calls, 12 (6 percent) were 411 calls, and 2 (1 percent) were 555 calls. The remainder of the non-coin calls, which totaled 108 (53 percent), appear to be subscriber 800 calls.

Of the 39 access code calls per month, AT&T received 20.1 calls (51.5 percent), MCI received 12.6 calls (32.2 percent), Sprint received 3 calls (7.7 percent), and the remaining carriers received a total of 3.3 calls (8.6 percent).

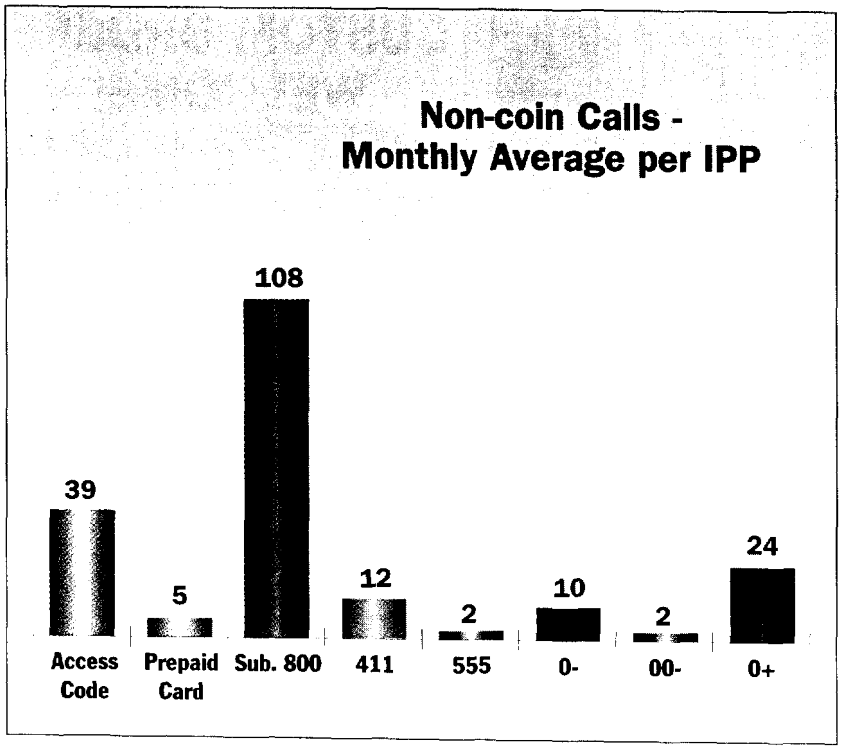
This of course brings us to dial-around compensation. The 1996 data showed an average of 152 dial-around calls per payphone per month: 108 (71 percent) were subscriber 800 calls, 39 (26 percent) were access code calls, and 5 (3 percent) were prepaid card calls. (To prevent any confusion, we

Dial-around Stats - Monthly Average per IPP*

Call Counts 1996	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Access Code Calls	31	40	38	44	39	46	49	35	39	38	32
Prepaid Card Calls	3	3	3	3	4	7	7	6	6	5	4
Subscriber 800 Calls	75	98	96	102	107	111	122	103	130	126	119
411	10	11	11	13	15	14	12	14	12	10	11
555	1	2	2	1	2	2	2	2	3	2	2
0-	11	10	10	11	12	13	11	9	8	7	7
00-	1	1	1	1	2	2	2	2	3	2	2
0+	29	31	26	27	25	25	28	20	19	18	16
Non-coin Calls Total	161	196	188	203	205	219	233	191	219	210	195
Coin Calls Total	423	505	468	535	536	556	544	526	524	494	509
Coin & Non-coin Total	584	701	656	738	742	775	777	716	744	704	703

Call Percentages 1996	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Access Code Calls	**20%**	**20%**	**20%**	**21%**	**19%**	**21%**	**21%**	**18%**	**18%**	**18%**	**17%**
Prepaid Card Calls	2%	2%	2%	2%	2%	3%	3%	3%	3%	3%	2%
Subscriber 800 Calls	**47%**	**50%**	**51%**	**50%**	**52%**	**51%**	**53%**	**54%**	**59%**	**60%**	**61%**
411	6%	6%	6%	6%	7%	6%	5%	7%	6%	5%	6%
555	**0%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**
0-	7%	5%	6%	6%	6%	6%	5%	5%	4%	4%	4%
00-	**1%**	**0%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**	**1%**
0+	18%	16%	14%	13%	12%	11%	12%	11%	9%	9%	8%
Non-coin Calls Total	**28%**	**28%**	**29%**	**27%**	**28%**	**28%**	**30%**	**27%**	**29%**	**30%**	**28%**
Coin Calls Total	72%	72%	71%	73%	72%	72%	70%	73%	71%	70%	72%

** Due to rounding, the totals in this table may not be exact.*



should note that the APCC had previously submitted dial-around data to the FCC that showed a total of 142 dial-around calls per month: 99 [70 percent] were subscriber 800 calls, 40 [28 percent] were access code calls, and 3 [2 percent] were prepaid card calls. These stats were based on three months' worth of data; the current results are from 11 months' worth of data.)

A few trends

The 1996 data also revealed what many of you already knew: coin-sent paid is the predominant type of call made from payphones, representing 72 percent of all calls. Concerning non-coin calls, subscriber 800 is the most prevalent call type. In fact, this category increased from 47 percent of all non-coin calls in February to 61 percent of all non-coin calls in December. Access code calls declined slightly throughout the year: 20 percent in February, a high of 21 percent in May, July and August, and a low of 17 percent in December.

Regarding other types of non-coin calls, directory assistance calls remained consistent during 1996. As for operator-assisted calls, 0- calls declined slightly during the year: from 7 percent in February to 4 percent in December. The 00- calls remained relatively flat (at 1 percent), while 0+ calls decreased dramatically, from 18 percent in February to 8 percent in December.

Which IXCs are getting these non-coin calls? The top seven carriers receive 97.4 percent of all access code calls. This group consists of AT&T, MCI, Sprint, LDDS WorldCom, Frontier, LCI and Excel. Figure 1 shows the percentage breakdown by IXC.

Clearly, this new data justifies the level of dial-around compensation that was set in the FCC's Payphone Order. It also substantiates the move to per-call compensation, and verifies a few other trends we had suspected but had not been able to quantify. The APCC will continue to gather this information for use in its legal, legislative and regulatory efforts. If you'd like to participate or if you'd like more information about the project, please call me at (703) 385-5300, ext. 225. ■

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